NGU CHEE WUI v. PP

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ABDUL AZIZ ABDUL RAHIM JCA
VARGHESE GEORGE VARUGHESE JCA
[CRIMINAL APPEAL NO: Q-05-205-07-2011]
18 JUNE 2014

CRIMINAL LAW: *Dangerous drugs – Trafficking and possession – Appeal against conviction and sentence – Prima facie case – Whether established – Whether proper caution under s. 37A Dangerous Drugs Act 1952 administered to appellant – Conduct of appellant in handing drugs to police officer in response to being questioned – Whether a statement within meaning of s. 37A – Whether admissible – Whether trial judge failed to give proper judicial appreciation to evidence which may be favourable to appellant – Whether a misdirection by trial judge in invoking presumption of trafficking – Whether appropriate for trial judge to use expression 'presumably' in describing fact or inference of fact – Dangerous Drugs Act 1952, ss. 37, 37(da)(xvi), 37A*

CRIMINAL PROCEDURE: *Police investigation – Cautioned statement – Administration of – Whether proper caution under s. 37A Dangerous Drugs Act 1952 administered to appellant – Caution must be properly and legally administered using words clearly understood by suspect – Whether sufficient for police officer to testify that caution administered without stating exact words used – Conduct of appellant in handing drugs to police officer in response to question – Whether a statement within meaning of s. 37A – Whether admissible – Dangerous Drugs Act 1952, ss. 37, 37(da)(xvi), 37A*

EVIDENCE: *Cautioned statement – Admissibility – Administration of caution – Whether proper caution under s. 37A Dangerous Drugs Act 1952 administered to appellant – Caution must be properly and legally administered using words clearly understood by a suspect – Whether sufficient for police officer to testify that caution administered without stating exact words used – Conduct of appellant in handing drugs to police officer in response to question – Whether a statement within meaning of s. 37A – Whether admissible – Dangerous Drugs Act 1952, ss. 37, 37(da)(xvi), 37A*

The appellant was charged with three offences under the Dangerous Drugs Act 1952 ('the Act') for trafficking in 78g of methamphetamine (first charge), possessing 0.25g of cannabis (second charge) and possessing 4.22g (3.81g of ketamine and 0.41g of methamphetamine) (third charge). During a surveillance conducted by PW1 and his team based on information received, the appellant was alighting from a car when he was arrested. Upon inspection of the interior of the said car, the said offending drugs were found. It was the appellant's defence that the car belonged to his wife ('PW5') and therefore he did not have exclusive possession of the car. The appellant further submitted that he had no knowledge of the offending drugs inside the car and

that no caution was ever administered to him by the police. The trial judge, in ruling that the prosecution had proven a *prima facie* case against the appellant, found that in the circumstances of the case there was irresistible inference that the appellant had custody and control of the dangerous drugs. The trial judge further held that the non-recording of the administering of the cautionary words in the first information report (exh. P3) was not fatal to the prosecution's case. The High Court thus convicted and sentenced the appellant to death for the offence under s. 39B(2) and imposed fine for offences for possession of drugs under ss. 6 and 12(3) of the Act. Hence, this appeal. The appellant submitted that the principal issue that arose was that the caution under s. 37A of the Act was never administered to the appellant before the appellant was asked by PW1 to show the police the drugs hidden in the car.

Held (allowing appeal; setting aside conviction and sentence on all charges) Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

(1) The purpose of cautionary words to be administered to the appellant (or a suspect) was to alert the appellant of his right to remain silent. Therefore, it is of extreme importance that the caution must be properly and legally administered using words which would be clearly understood by a suspect. Whether or not a proper caution had been administered to a suspect could only be judged from the very words used by the police officer who administered the caution. It is insufficient for a police officer who had administered the caution to a suspect merely to testify in court that he had administered the caution but without stating the exact words that were used by him to administer the caution. This court was inclined to agree with the appellant that most probably no proper caution under s. 37A of the Act was administered to the appellant. (paras 15 & 17)

(2) The conduct of the appellant in picking up various exhibits that contained the dangerous drugs from inside the said car in response to a question by PW1 and handing them to PW1, was a statement within the meaning of s. 37A of the Act. Therefore, the prosecution must show that a proper caution had been administered to the appellant in accordance with the requirement of s. 37A before the appellant was requested to show PW1 the dangerous drugs that the appellant had taken out from the car. In the absence of clear evidence that such caution had been administered, as in the present appeal, the evidence of the appellant in taking out the drugs and showing them to PW1 would be inadmissible. (para 20)

(3) It was an undisputed fact that the said car belonged to PW5, the appellant's wife, whose evidence clearly said that the appellant did not have exclusive use and access to the said vehicle. PW5's evidence was unchallenged and her credibility was not impeached. Thus, the failure by the trial judge to give proper judicial appreciation to PW5's evidence

which may be in the circumstances favourable to the appellant in so far as it concerned the exclusiveness or otherwise of the appellant's possession of the car in which the drugs were found was a misdirection in law. (paras 22 & 23)

(4) The trial judge had invoked the presumption of trafficking under s. 37(da)(xvi) of the Act, but nowhere in his judgment did the trial judge make a finding that the appellant had failed or otherwise to rebut the presumption. This was a misdirection in law because the trial judge had failed to direct his mind to the evidence which may or may not have the effect of rebutting the rebuttable presumption under that section. (para 24)

(5) The trial judge had, on numerous occasions in his judgment, used the expression 'presumably' in describing a fact or an inference of fact. This was inappropriate in any judgment. A trial judge has an obligation to make a specific and clear finding of facts or an inference of facts based on the evidence before him. A trial judge should not presume anything. The only exception where a trial judge could rely on presumption is where the presumption is permissible by law. Even then, before the legal presumption is invoked, there must be sufficient facts to provide for the foundation to justify the invocation of the presumption. Thus, the conviction of the appellant on all the three charges were unsafe. (para 25)

Bahasa Malaysia *Translation Of Headnote*

Perayu telah dipertuduh dengan tiga kesalahan di bawah Akta Dadah Berbahaya 1952 ('Akta') untuk pengedaran 78g methamphetamine (pertuduhan pertama), milikan 0.25g kanabis (pertuduhan kedua) dan milikan 4.22g (3.81g ketamine dan 0.41g methamphetamine) (pertuduhan ketiga). Semasa pengawasan dijalankan oleh PW1 dan pasukannya berdasarkan maklumat yang diterima, perayu telah ditahan apabila dia keluar dari sebuah kereta. Setelah pemeriksaan dijalankan ke atas bahagian dalam kereta tersebut, dadah-dadah berbahaya tersebut telah dijumpai. Adalah pembelaan perayu bahawa kereta tersebut milik isterinya ('PW5') dan oleh itu dia tidak mempunyai milikan eksklusif ke atas kereta tersebut. Perayu juga menghujahkan bahawa dia tidak mempunyai pengetahuan mengenai dadah-dadah dalam kereta tersebut dan tiada pernyataan beramaran telah diberikan kepadanya oleh pihak polis. Hakim bicara, dalam memutuskan bahawa pihak pendakwaan telah membuktikan kes *prima facie* terhadap perayu, mendapati bahawa dalam hal keadaan kes ini satu-satunya inferens yang boleh dibuat adalah bahawa perayu mempunyai jagaan dan kawalan ke atas dadah berbahaya tersebut. Hakim bicara juga memutuskan bahawa ketidakrakaman pernyataan beramaran dalam laporan maklumat pertama (eks. P3) tidak menjejaskan kes pihak pendakwaan. Mahkamah Tinggi dengan itu telah mensabitkan dan menjatuhkan hukuman mati ke atas perayu untuk kesalahan di bawah s. 39B(2) dan mengenakan denda untuk kesalahan

milikan dadah di bawah ss. 6 dan 12(3) Akta. Oleh itu, rayuan ini. Perayu menghujahkan bahawa isu utama yang timbul adalah bahawa pernyataan beramaran di bawah s. 37A Akta tidak diberikan kepada perayu sebelum perayu disuruh oleh PW1 menunjukkan kepada pihak polis dadah-dadah yang ditemui dalam kereta tersebut.

Diputuskan (membenarkan rayuan; mengetepikan sabitan dan hukuman ke atas semua pertuduhan)

Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

(1) Tujuan pernyataan beramaran diberikan kepada perayu (atau tertuduh) adalah supaya perayu peka kepada haknya untuk berdiam diri. Oleh itu, adalah amat penting bahawa pernyataan beramaran diberikan secara betul dan mengikut undang-undang dengan menggunakan perkataan-perkataan yang akan dengan jelas difahami oleh tertuduh. Sama ada amaran diberikan secara betul kepada tertuduh hanya boleh dinilai daripada kata-kata yang digunakan oleh pegawai polis yang telah memberikan amaran. Adalah tidak memadai untuk pegawai polis yang telah memberikan amaran kepada tertuduh hanya untuk memberi keterangan di mahkamah bahawa dia telah memberikan amaran tanpa menyatakan perkataan yang tepat yang telah digunakan olehnya untuk memberikan amaran. Mahkamah ini bersetuju dengan perayu bahawa tiada amaran yang teratur telah diberikan kepada perayu di bawah s. 37A Akta.

(2) Kelakuan perayu dalam mengambil beberapa eksibit yang mengandungi dadah berbahaya daripada kereta tersebut sebagai tindak balas kepada soalan PW1 dan menyerahkannya kepada PW1, adalah pernyataan dalam maksud s. 37A Akta. Oleh itu, pihak pendakwaan harus menunjukkan bahawa amaran teratur telah diberikan kepada perayu mengikut kehendak-kehendak s. 37A sebelum perayu disuruh menunjukkan kepada PW1 dadah-dadah berbahaya yang telah diambil oleh perayu dari kereta tersebut. Dalam ketiadaan keterangan jelas bahawa amaran telah diberikan, seperti dalam rayuan ini, keterangan perayu mengeluarkan dadah-dadah dan menunjukkannya kepada PW1 tidak boleh diterima.

(3) Adalah satu fakta yang tidak boleh dipertikaikan bahawa kereta tersebut adalah milik PW5, isteri perayu, yang keterangannya telah dengan jelas menyatakan bahawa perayu tidak mempunyai penggunaan dan akses eksklusif ke atas kereta tersebut. Keterangan PW5 tidak dibantah dan kredibilitinya tidak dicabar. Oleh itu, kegagalan hakim bicara memberikan penghargaan penghakiman yang sewajarnya kepada keterangan PW5 yang mungkin memihak kepada perayu berkenaan sama ada perayu mempunyai milikan eksklusif ke atas kereta di mana dadah-dadah ditemui adalah satu salah arahan dari segi undang-undang.

(4) Hakim bicara telah menggunakan anggapan pengedaran di bawah s. 37(da)(xvi) Akta, tetapi hakim bicara tidak membuat dapatan dalam penghakimannya sama ada perayu telah gagal untuk mematahkan anggapan tersebut. Ini adalah satu salah arahan dari segi undang-undang kerana hakim bicara telah gagal untuk mengarahkan fikirannya kepada keterangan yang mungkin mempunyai kesan menyangkal anggapan yang boleh dipatahkan di bawah seksyen tersebut.

(5) Hakim bicara telah, beberapa kali dalam penghakimannya, menggunakan ungkapan 'presumably' dalam menerangkan fakta atau membuat kesimpulan fakta. Ini tidak sesuai dalam mana-mana penghakiman. Hakim bicara mempunyai obligasi untuk membuat dapatan fakta yang spesifik dan jelas atau membuat kesimpulan fakta berdasarkan keterangan yang berada di depannya. Hakim bicara tidak sepatutnya membuat apa-apa anggapan. Hakim bicara harus membuat keputusan berdasarkan keterangan fakta yang dikemukakan di hadapannya. Satu-satunya pengecualian di mana seorang hakim bicara boleh bergantung kepada anggapan adalah apabila anggapan dibenarkan oleh undang-undang. Itupun, sebelum anggapan undang-undang digunakan, fakta yang mencukupi perlu ada untuk menyediakan asas bagi mewajarkan seruan anggapan. Oleh itu, sabitan perayu ke atas ketiga-tiga pertuduhan adalah tidak selamat.

Case(s) referred to:
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***
Lau Keen Fai v. Lim Ban Kay [2011] 3 CLJ 213 HC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Lim Kah Wan v. PP [1985] 2 CLJ 473; [1985] CLJ (Rep) 530 HC ***(refd)***
PP v. Mohd Fahmi Hamzah [2002] 1 LNS 59 HC ***(refd)***
Raman Kunjiraman v. PP [2014] 9 CLJ 915 FC ***(refd)***
Tan Ah Tee & Anor v. PP [1978] 1 LNS 193 HC ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Y Jeyamuraly Yesiah v. PP [2007] 5 CLJ 605 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 107
Dangerous Drugs Act 1952, ss. 6, 12(3), 37A(1), 37(da)(xvi), 39B(2)
Evidence Act 1950, ss. 27, 37

For the appellant - Orlando Chua; M/s Wong, Orlando Chua & Kuok Advocs
For the respondent - Lailawati Ali; DPP

[Appeal from High Court, Bintulu; Criminal Trial Nos: 45-03-09 (BTU) & 45-04-09 (BTU)]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

Introduction

[1] This is an appeal by the appellant/accused against the High Court B decision which convicted and sentenced him to death for the offence under s. 39B(2), and imposed fine for two offences for possession of drugs under s. 6 and s. 12(3) of the Dangerous Drugs Act 1952 ("the Act") respectively.

Background Facts

C **[2]** The appellant, Ngu Chee Wui, was charged with three offences under the Dangerous Drugs Act 1952 *viz.* trafficking in 78g of methamphetamine (first charge), possessing 0.25g of cannabis (second charge) and possessing 4.22g (3.81g of ketamine and 0.41g of methamphetamine) (third charge). The common vein that runs through all the three charges is the element of D "possession".

[3] On 18 January 2008, at about 9.30pm, Insp Zahril Asri bin Mohd Zain (PW1) and his team conducted surveillance at Sub Lot 17, Taman Heng, Bintulu based on information received. At about 10pm, the appellant was seen driving a Proton Waja bearing registration No. QSF 5550 and E stopping in front of a house at Sub Lot 17, Taman Heng, Bintulu. He opened the gate and drove the car into the car porch.

[4] PW1 and his team rushed to the appellant when he alighted from his car. They introduced themselves as policemen and arrested the appellant. The appellant looked scared. Body search was conducted but no F incriminating item was found on the appellant's body. PW1 then administered and explained the caution to the appellant in simple Malay language. PW1 then asked, "Ngu, adalah terpulang kepada kamu untuk memberitahu sesuatu kepada saya jika ada atau tidak ada apa-apa barang salah. Sila keluarkan."

G **[5]** The appellant nodded his head and answered, "Yes." The appellant told PW1 there was a bag inside the car. L/Cpl Rashid (PW2) and Constable Afiq guarded the appellant, and they went to the rear seat on the left and took out a black bag (exh. P4). Inside the bag, it contained one metal pencil box (exh. P5) and one cut of pink straw tube containing crystalline substance H which was confirmed by the Chemist to contain 0.32g methamphetamine. The appellant also took out one tissue box (exh. P6) at the front passenger seat. Inside the tissue box were five transparent plastic packets containing crystalline substance which the Chemist confirmed contained 76.60g of methamphetamine. The appellant went to the left back door and took out one I cigarette pack in white (exh. P7), at the middle portion of the back passenger seat. Inside the packet were 400 pink tablets which the Chemist containing 3.81g of ketamine and 0.41g of methamphetamine. The appellant also took

out one cigar container (exh. P8) from the back pocket of the front passenger seat. Inside the cigar container, there were two pink straw tubes containing crystalline substance confirmed by the Chemist to contain 1.08g of methamphetamine. There were also two blue straws containing dried leaves which the Chemist confirmed contained 0.25g of cannabis.

The Appellant's Defence

[6] The car belonged to the appellant's wife. Therefore, the appellant did not have exclusive possession of the car. On that ill-fated day, the appellant was conducting a test drive on the car and found out that there was an abnormal sound coming from the drive shaft. The appellant was arrested when he drove the car back to the house.

[7] The policemen had conducted a thorough search of the interior of the car and had already found the drugs before the appellant was ordered to take out the drugs from the car. The appellant said he was only following orders as PW1 had threatened him. The appellant said he had no knowledge of the offending drugs inside the car. The appellant also alleged that no caution was ever administered to him by the police.

Findings Of The High Court Judge

[8] The learned judge in his judgment found that in the circumstances of the case there was irresistible inference that the appellant had custody and control of the dangerous drugs. The learned judge also found that the appellant had himself taken out the packages from the various containers all of which he himself took out from various locations inside the car of which he was solely in charge when he was arrested. The learned judge also invoked the presumption under s. 37(da)(xvi) of the Act.

[9] In his ruling at the close of the prosecution case that the prosecution had proved a *prima facie* case against the appellant, the learned judge ruled that non-recording of the administering of the cautionary words in the first information report (exh. P3) was not fatal to the prosecution's case. The learned judge accepted the prosecution's contention that the caution administered to the accused person was not information. His Lordship reasoned that s. 107 of the Criminal Procedure Code only required information relating to the commission of an offence to be recorded. Further, PW1 had testified that he had read the caution to the appellant. This was supported by PW2. In addressing this, the learned judge had focused on the defence's submission that cautionary words under s. 37A of the Act were not actually read to the appellant by PW1. Learned counsel for the defence had submitted that the cautionary words were missing from the first information report (exh. P3) and contended that cautionary words were not administered thereby rendering inadmissible as evidence "all the seemingly incriminating items found or discovered or purportedly "surrendered" by the appellant to PW1". The learned judge was also of the view that PW1 had given evidence

in a sworn testimony and had stated in exh. P3 that he read to the appellant the caution. At para. 6 of his written ruling at the end of the prosecution case (at p. 228 of the record of appeal) the learned judge said:

> 6. To begin with, it is the sworn testimony of PW1, that presumably notwithstanding the said cautionary words having not stated in Ex. P3, he actually did read the caution under section 37A of the DDA. Anyway, PW1 did state in Ex. P3 that he had read to the Defendant the caution. PW2 testified he heard PW1 reading the caution although PW2 could not recall the words.

[10] It appears from the appeal record that the learned judge had indicated, at the time of delivering the decision at the close of defence case, that he would provide more detailed grounds of decision later. The detailed grounds of judgment were subsequently prepared and filed as Supplementary Record of Appeal No. 2 which contained 13 pages of reasoning by the learned judge dated 18 October 2013. With regard to the issue of the caution statement, this is what the learned judge said in his detailed grounds of judgment at para. 19:

> 19. By his re-visiting the statutory caution issue in his submission at the end of the defence case, learned counsel for the accused apparently intended to show, that presumably after hearing the accused's testimony, this Court's finding that the statutory caution was administered could no longer be sustained. Learned counsel attempts "to show the improbability at that time that it was the Defendant, who after being allegedly cautioned he proceeded to take out all the incriminating items." The defence counsel tries to draw support from the following matters:
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> a. The cautionary words were not recorded in the First Information Report (exhibit P3), such absence of those words has not been explained;
>
> b. Inconsistencies in aspects of his testimony namely pertaining to the exact place where the accused was arrested, and the spot inside the car where the black bag (exhibit P4) was found;
>
> c. PW2's "inability to recite the cautionary words purportedly used by PW1";
>
> d. The accused "was threatened to co-operate" in presumably looking for anything incriminating."

[11] Still on the issue of caution statement, at paras. 26, 27 and 28, the learned judge said as follows:

> 26. As regards the need or otherwise for a trial within a trial to be conducted – to begin with, matters concerning such an issue were never raised during and/or at the end of the prosecution case. At that stage, it seems among the lines of defence were, "the Defendant was never asked to physically fish out those alleged incriminating items from the said vehicle at all ... it was the police personnel present that night who must

have picked up all those purported incriminating items with their gloved hands", and that it was unsafe to come to a finding that the statutory cautionary words were administered.

27. At the end of the prosecution case, the defence relied substantially on the purported fact that during the night in question, "there was simply nothing to stop the police from examining the inside of the said vehicle ... and that with the benefit of the briefings by PW4, there was nothing to stop him (PW1) from taking out ex. P4 (the black bag) (and P6 – the tissue box) to search (each of them)". In this connection, learned counsel labelled as "mere embellishment on the part of PW1 for (going) against the very core of ... instructions ... given by PW4 (DSP Martin Khoo) 'to conduct a thorough search of ... vehicle QSF5550 ... the minute the driver was apprehended.'

28. Now, PW1's spontaneous response when cross-examined "to give one good reason why it wasn't done (ie, examining the inside of the said vehicle and presumably seizing by the police personnel of, *inter alia*, P4 and P6) was: because he had read – presumably to the accused – the caution under s. 37A of the Act. That spontaneous response as to the reason why there was no search done by the police personnel including PW1 as presumably instructed by PW4 ie, because he (PW1) had read the caution under s. 37A of the Act, appeared to me to be clearly indicative of the statutory cautionary words having actually been read to the accused after his arrest. With respect, I find no good reason why this court should reconsider its finding on the issue of whether the statutory caution was administered.

This Appeal

[12] Before us, learned counsel for the appellant submitted that there was only one principal issue in this appeal and that was the caution under s. 37A of the Act was never administered to the appellant before the appellant was asked by PW1 to show the police the drugs hidden in the car. We will begin to discuss this issue by referring to the relevant section of the Act that is s. 37A. The gist of this section is that where any person is charged with any offence against the Act, any statement by that person, whether it amounts to a confession or not or whether it is oral or in writing made at any time whether before or after a person is charged or whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, to any police officer of or above the rank of Inspector will be admissible in evidence at his trial notwithstanding anything to the contrary contained in any written law. However, the proviso to the said s. 37A provides that:

Provided that no such statement shall be admissible or used as aforesaid:

(a) If the making of the statement appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the Court to give such person

A grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(b) in the case of a statement made by such person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:

B

It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

C Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.

[13] Learned Deputy Public Prosecutor (DPP) submitted firstly, that on D the evidence PW1 had administered the caution under s. 37A of the Act to the appellant. This, he said was corroborated by PW2's testimony. Secondly, learned DPP submitted that even though the words used by PW1 to administer caution to the appellant were not written in exh. P3 (the first information report) it was not fatal to the prosecution's case because, he said, E s. 107 of the CPC required only information to be recorded in the first information report.

[14] However, in our view the real issue here is not whether the cautionary words that were said to the appellant are required to be recorded in the first information report or not; the real issue is whether the caution under s. 37A F of the Act was administered to the appellant at all. In this regard, learned counsel for the appellant Mr Orlando Chua submitted that the testimony of PW1 that he had cautioned the appellant under s. 37A of the Act by reading the following cautionary words: "Adalah menjadi kewajipan memberi amaran kepada kamu bahawa kamu tidak diwajibkan untuk menyatakan apa-apa atau menjawab apa-apa soalan tetapi apa jua yang kamu katakan sama G ada menjawab atau sebaliknya boleh dijadikan keterangan", was not to be believed. Also not to be believed was the testimony of PW1 that said apart from the above cautionary words he had also taken the liberty to explain the caution to the appellant in simple Malay language and of which under cross-examination PW1 testified that the explanation he gave was as follows:

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Ngu, adalah terpulang kepada kamu untuk memberitahu sesuatu kepada saya. Jika ada atau tidak ada apa-apa barang salah, sila keluarkan." The reason given by learned counsel for this, is that "it is pretty undisputed that upon the appellant emerging from the said vehicle and once confronted by the team of 10 police officers led by PW1, he was I immediately placed under arrest, and in all probability, immediately handcuffed thereafter.

From exhibit P3 it is conspicuous that the prescribed cautionary words provided under section 37A of the Act were missing. From exhibit P3, PW1 had purportedly recorded the following:

> Saya telah menanyakan sama ada Sabjek ada menyimpan apa-apa perkara salah dan membaca kata-kata amaran di bawah Sek. 37A Akta Dadah Berbahaya dan menerangkan kata-kata amaran itu dengan bahasa yang difahami olehnya.

[15] PW1 was cross-examined on this part of his testimony to which PW1 agreed with the suggestion by learned counsel for the appellant that the purpose of cautionary words to be administered to the appellant (or a suspect) was to alert the appellant to his right to remain silent. Therefore in our view it is of extreme importance that the caution must be properly and legally administered using words which would be clearly understood by a suspect (in this case the appellant). The ideal situation is of course to read to the appellant the very words of caution that are stated in proviso (b) to s. 37A(1) of the Act. However, if the exact words could not be remembered or cited, words to the like effect would be sufficient. Whether or not a proper caution had been administered to a suspect can only be judged from the very words used by the police officer who administered the caution. In our view it is insufficient for a police officer who had administered the caution to a suspect merely to testify in court that he had administered the caution but without stating the exact words that were used by him to administer the caution. In *PP v. Mohd Fahmi Hamzah* [2002] 1 LNS 59; [2002] 6 MLJ 340, referred to us by learned counsel for the appellant in his written submission, the same issue (that is learned counsel for the accused in that case contended that PW5 merely said that he administered the caution but there was no evidence of the exact caution that was administered) was discussed. In that case the court agreed with the submission of the learned counsel that there must be evidence of the precise words of the caution that was administered. Evidence of the words of the caution that was administered is a statutory pre-condition to the admissibility of a cautioned statement. The court in that case went on to say that:

> the requirement that the court must be satisfied that a caution was administered '... in the following words or words to the like effect ...' is a statutory direction to the court to ensure that the prescribed caution has been administered. This is significant as this means that there must be evidence of the caution that was administered. In the absence of such evidence, the court will not be able to rule whether the prescribed caution or words to the like effect were administered. Thus, the actual words of the caution that was administered must be adduced in evidence. This caution enshrines certain in-built rights like, for instance, the right of silence. It is therefore important to ensure that these rights have been properly communicated to an accused person. In the circumstances, a mere statement that a caution was administered is insufficient ...

The principle was endorsed by the Federal Court in *Francis Antonysamy v. PP* [2005] 2 CLJ 481, when the court said that:

> It can therefore be seen that the satisfaction of the court on the administration of the caution goes to the very root of the admissibility of a statement that had been made. What requires consideration is whether a mere reading of the caution will amount to the court being 'satisfied' that it had been administered ...
>
> The court can be 'satisfied' that the caution was administered as required only with adequate proof of the words used. This can only be done if there has been evidence of the actual words used by the recording officer. In that event the court would be in a position to determine whether the caution that was administered is as prescribed or to the like effect or is something that is different ...
>
> It follows that in the absence of any evidence by the recording officer of the actual words used of the caution that was administered evidence of such words in the cautioned statement cannot be used to supplement the deficient evidence. In any event he did not say that the caution that he read is as recorded in the cautioned statement ...
>
> The result is that there is no evidence before the court in order to be 'satisfied' whether the caution that was administered is as prescribed or contain words to the like effect".

[16] In the present appeal learned counsel for the appellant had challenged the evidence of PW1 that he had administered the caution to the appellant. Learned counsel for the appellant suggested to PW1 that his first information report (exh. P3) was made about two years ago (the appellant was arrested on 18 January 2008 and the trial commenced on 15 March 2010) that is very soon after the arrest of the appellant but without the cautionary words appearing in it. Therefore it was suggested to PW1 that, because of the absence of those words in his first information report (exh. P3), PW1 could not possibly be sure satisfactorily what were the cautionary words administered to the appellant then.

[17] We are inclined to agree with the submission by learned counsel for the appellant that most probably no proper caution under s. 37A was administered to the appellant. As it was pointed out to us by the learned counsel for the appellant that even the learned judge was not very certain whether the statutory caution had in fact been administered when in his grounds of decision, the learned judge said as follows:

> In the instant case, PW2's evidence does appear corroborative to PW1's testimony to the extent that in all probability the reading of the cautionary words did occur as testified to by PW1. At the same time however such testimony also seems not corroborative of PW1's testimony to the extent of PW2 being unable to recall and recite in court those cautionary words.

[18] We have also considered the evidence of PW2 on this issue. We note that PW2 in his testimony supposedly to be in support of PW1's evidence, is not of much assistance to us to make unequivocal finding that a proper caution was administered to the appellant. PW2 in this testimony had said that he heard PW1 administer the caution but he could not remember the words that were used. We find this rather unsatisfactory because these police officers (PW1 and PW2) are not greenhorns, but they are experienced officers.

[19] A related issue is the issue whether the expression "any statement in s. 37A(1)" includes physical conduct of the appellant which would be caught as not being admissible for want of caution. In this present appeal the evidence of PW1 and PW2 was that when the appellant was confronted by the police raiding party he was immediately put under arrest. PW1 and PW2 also testified that it was the appellant (DW1) himself who had taken out all the drugs from various locations inside the car bearing registration No: QSF550 which at that material time was driven by the appellant, and showed them to PW1. However, the appellant in his defence had said that he had taken out all the drugs from inside the car upon being ordered by PW1. This conduct of the appellant is relevant because learned DPP in his written submission had linked the conduct with the issue of possession when he submitted that from the clear facts the appellant had direct possession on all the drugs seized in the present case as the appellant was holding all the drugs seized when he took out all those drugs from the said car. It was submitted that from the appellant's conduct of taking out all the drugs from the said car; particularly from metal pencil box (exh. P5), tissue box (exh. P6), cigarette pack (exh. P7), cigar container (exh. P8) and the nature of packaging of all the drugs; ie, using transparent straw tubes and transparent plastic packet; it is impossible to say that the appellant had no knowledge pertaining to the drugs seized in the present case. Thus, at the time when the appellant was seen holding the said drugs; there was no reason to say that the appellant had no knowledge of what he was holding at that particular time when there is no other wrapping or packaging to hide his view to see the content of the transparent plastic packet and the transparent straw tube. (see *Tan Ah Tee & Anor v. PP* [1978] 1 LNS 193; [1978-79] 1 SLR 211).

[20] In *Lim Kah Wan v. PP* [1985] 2 CLJ 473; [1985] CLJ (Rep) 530, the learned judge after referring to some earlier cases had observed that the action of the appellant in nodding was a statement. In other words, the court accepted that a conduct can amount to a statement under s. 37A. This position of the law was approved by this court consisting of a different coram in *Y Jeyamuraly Yesiah v. PP* [2007] 5 CLJ 605, where the court had to deal with the very issue whether the conduct of the appellant in responding to the question by a police officer amounted to a statement within s. 37A of the Act or whether it amounted to information leading to discovery under s. 37 of

the Evidence Act 1950. In that case, the action of the appellant was picking up a biscuit tin which contained the dangerous drugs in question. The court held that "actions such as pointing or nodding or handing over physically an item in respond to a question or request are statements within the contemplation of s. 37A of the Act or tantamount to information received from a person accused of any offence in the custody of a police officer under s. 27 of the Evidence Act 1950 depending upon the circumstances of the case." On the above authorities, we too accept that a conduct in the circumstances elucidated in the above authorities, which in this present appeal refers to the conduct of the appellant in picking up the various exhibits that contained the dangerous drugs from inside the said car in respond to a question by PW1 and handing them to PW1, is a statement within the meaning of s. 37A. Therefore, the prosecution must show that a proper caution had been administered to the appellant in accordance with the requirement of s. 37A before the appellant was requested to show PW1 the dangerous drugs that the appellant had taken out from the car. In the absence of clear evidence that such caution had been administered, as in the present appeal, the evidence of the conduct of the appellant in taking out the drugs and showing them to PW1 would be inadmissible.

[21] Another ground of the learned judge's judgment attacked by the appellant's counsel was the learned judge's finding on possession. The learned judge's finding on this issue was anchored on two primary facts. The first fact is that the knowledge of the appellant about the presence of the drugs in the car. The learned judge, from the evidence had come to this conclusion based on the submission of the prosecution which he accepted that the appellant himself had taken the drugs out from inside the car when he was asked by PW1 whether he had any contraband item with him. The second primary facts relied upon by the learned judge to conclude that the appellant had exclusive possession was that the appellant was driving the car and that he accepted the submission by learned DPP that the appellant contention and defence that he was merely test driving the car CSF550 could not be true because that evidence was never put to the prosecution witnesses PW1, PW2, PW5 and PW7 during cross-examination. It was also not, according to learned DPP in his submission, put to PW1, PW2 and PW7 or to any of the police personnel present at the scene during the arrest of the appellant when that was the first available opportunity that the appellant had to inform the police about the test drive. The learned judge also accepted the submission by the DPP that the appellant's wife, PW5 also did not testify to the fact that the appellant was test driving the car. In his assessment of this defence by the appellant, the learned judge concluded in his judgment by saying the following:

> 17. Notwithstanding the principle that "failure on the part of the defence to put its case as aforesaid (presumably to the relevant prosecution witnesses), can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt"

(*Alcontra a/l Ambross Anthoy v. PP* [1996] 1 CLJ 705 (Federal Court)], the aforesaid submission by the learned DPP would appear tenable. The circumstances of the instant case are such that it would have been, not only logical but also natural, for the accused to have forthwith disclosed the main components of the non-exclusive access to QSF550 – line of defence upon being confronted by the police during the evening of his arrest. Not only this was not done, there was also never any attempt to elicit or put such a line of defence during the cross-examination of the relevant prosecution witnesses, including and particularly PW1, PW2, PW5 and PW7. This aspect of the accused's defence is, therefore, unacceptable and neither has it raise any reasonable doubt in the prosecution's case.

18. In view of the aforesaid, the substance of the prosecution case concerning which this court has made a finding of a *prima facie* case remains intact, ie, that during the night in question, prior to his arrest the accused alone was seen driving QSF550 to Lot 17 Taman Hing, Bintulu, and that upon being confronted by the police the accused himself took out all the offending substances from various locations inside the car QSF550.

[22] However, learned counsel for the appellant argued that it was an undisputed fact that the car CSF550 belonged to PW5, the wife of the appellant who was called by the respondent to testify for the prosecution. PW5 in her evidence clearly said that the appellant did not have exclusive use and access to the said vehicle. This part of the PW5's evidence was unchallenged and her credibility was not impeached. Therefore, it was submitted that her evidence must be taken as the truth. Learned counsel for the appellant also submitted that due to the nature of appellant's business in oil palm plantation, as testified by the appellant, many other people also used the car and these included oil palm plantation managers, assistant managers, foremen, technicians and storekeepers. It was also argued that the appellant had testified that though these people had their own respective vehicles, they would borrow the appellant's vehicle when their own vehicles were sent for service or repair in town. It was submitted that this evidence was given by the appellant under oath and he was strenuously cross-examined by the prosecution yet the appellant had remained steadfast to his evidence. The appellant also testified that the car QSF 550 belonged to PW5 and he seldom drove it. This fact was corroborated by PW5 and she was not challenged on it. Thus it was submitted by learned counsel for the appellant that what was stated by PW5 must be taken to be true. (see *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212 and *Lau Keen Fai v. Lim Ban Kay* [2011] 3 CLJ 213).

[23] We also observe that the learned judge in his grounds of judgment had hardly analysed with critical eye the evidence of PW5. In our view the failure by the learned judge to give a proper judicial appreciation to PW5's evidence which may be in the circumstances favourable to the appellant in so far as it concerns the exclusiveness or otherwise of the appellant's

possession of the car in which the drugs were found is a misdirection in law (see *Tan Boon Kean v. PP* [1995] 4 CLJ 456; [1995] 3 MLJ 514 FC and *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 FC). We take note that learned counsel for the appellant in his submission had also criticised the judgment of the learned judge of being not a speaking judgment and contained no affirmative finding of crucial and material facts which may of assistance to the appellant.

[24] We also note that the learned judge had, in para. 25 of his "detail" grounds which was filed as Supplementary Record of Appeal No. 2 had invoked the presumption of trafficking under s. 37(da)(xvi) of the Dangerous Drugs Act 1952, but nowhere in his judgment did the learned judge make a finding that the appellant had failed or otherwise to rebut the presumption. This, in our view is again a misdirection in law because the learned judge had failed to direct his mind to the evidence which may or may not have the effect of rebutting the rebuttable presumption under that section (see *Raman Kunjiraman v. PP* [2014] 9 CLJ 915 FC).

[25] Finally, we observe that the learned trial judge had, on numerous occasions in his judgment used the expression "presumably" in describing a fact or an inference of fact. For example, in finding that caution was read to the appellant the learned judge had said "... presumably notwithstanding the said cautionary words not having stated in exh. P3 ..."; and again in relation to the issue of possession in particular of exh. P4 and P6, the learned judge had said in para. 28 of his detail judgment as follows: "28. Now, PW1's spontaneous response when cross-examined "to give one good reason why it was not done (ie, examining the inside of the said vehicle and presumably seizing by the police personnel of, *inter alia*, P4 and P6) was: because he had read – presumably to the accused – the caution under s. 37A of the Act." We are of the view that this is not to be encouraged and is inappropriate in any judgment. A trial judge has an obligation to make a specific and clear finding of facts or an inference of facts based on the evidence before him. A trial judge should not presume anything. He must decide based on evidence of facts presented before him. The only exception where a trial judge could rely on presumption is where the presumption is permissible by law. Even then before the legal presumption is invoked there must be sufficient facts to provide for the foundation to justify the invocation of the presumption.

[26] For the above reasons, we are of the view that the conviction of the appellant on all the three charges is unsafe. Accordingly, therefore, we allow the appeal and set aside the conviction and sentence on all the charges and order that the appellant be acquitted and discharged from all the three charges.